

5519

David Basfuxter

PL 1

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE: B-190528**

**DATE: March 6, 1978**

**MATTER OF:**

**Dumont Oscilloscope Laboratories, Inc.**

**DIGEST:**

1. Issue of whether protest was filed before award and whether award was therefore in violation of ASPR § 2-407.8(b)(3) (1976 ed.) need not be resolved, since failure to follow cited ASPR is procedural defect which by itself does not affect validity of otherwise valid award.
2. Where invitation condition of waiver of bid sample was that item offered had been previously purchased or successfully tested by purchasing office and item offered by protester had only been purchased by other Government agencies, refusal of purchasing office to waive sample requirement was proper.
3. Where bid sample submitted with bid did not include manufacturer's Acceptance Test Procedures, needed to test item, or several of accessory items required, testing of which could thus not be accomplished and absence of which precluded determination of whether total weight of end item exceeded maximum allowable total weight, finding of bid to be nonresponsive is not objectionable.
4. Mere allegation that since items were missing from bid sample purchasing office probably lost them does not sustain burden of proof or affect validity of finding that bid was nonresponsive.
5. That activity took approximately 100 days to evaluate bid sample instead of 15 days permitted by solicitation did not prejudice protester.
6. Where bid on instant procurement was properly rejected by purchasing office, allegations of past improper actions on other procurements could not affect validity of instant award.

B-150528

Dumont Oscilloscope Laboratories, Inc. (Dumont), protests the award of a contract to Tektronix, Inc. (Tektronix), at \$13,136.50 rather than to itself by the San Antonio Air Logistics Center, Kelly Air Force Base, under invitation for bids No. F41608-77-B-0336.

The crux of the protest revolves around the bid sample requirement for this procurement of probe packages complying with the purchase description AF82-PD-352 (P/N 010-0160-00) attached to the invitation. Submission of a bid sample of the bidder's offered item was required of each bidder by bid opening under paragraphs C-18 and C-20 of the invitation Instructions, Conditions, and Notices to Offerors, unless the bidder was bidding on the brand name product or requested a waiver of the sample requirement, so that the sample might be tested and evaluated by means of functional and physical tests for interchangeability, reliability, and performance characteristics. Failure of the submitted sample to comply with all characteristics listed in the invitation for each test/evaluation would result in bid rejection. It was provided in paragraph C-19 of the same above-noted Instructions that the sample requirement might be waived if:

"\* \* \* (i) the offeror states in his offer that the product he is offering to furnish is the same as a product he has offered to the purchasing office on a previous procurement and (ii) the Contracting Officer determines that such product was previously procured or tested by the purchasing office and found to comply with specification requirements conforming in every material respect to those in this solicitation."

Three bidders submitted bids on the procurement. Dumont submitted the low bid price of \$12,900. Dumont submitted a bid sample. It also included on its pricing page the hand-written notation "our P/N 4299 B NSN 6625-00-053-6354." Other than through any inference that might be drawn from this notation, Dumont made no request for a waiver of the sample requirement in the manner specified in paragraph C-19.

B-190528

An examination of the Dumont bid sample showed that Dumont had not submitted a copy of its Acceptance Test Procedures for the item offered nor had it submitted all of the required probe assembly accessories (banana plug tip; one of the two insulated miniature alligator clips; probe holder; 5.5-inch ground lead; 12.5-inch ground lead, although an 8.5-inch ground lead was supplied). In addition to the need of these accessories for performance testing purposes, without the accessories the maximum allowable weight of the item offered could not be determined. Accordingly, the contracting officer determined the Dumont bid to be nonresponsive for the above reasons. On October 4 a letter to this effect was sent to Dumont, and the contract with Tektronix was signed by the contracting officer.

Upon receipt on October 11 of the October 4 letter advising of the rejection of its bid, Dumont telephonically contacted the contracting activity to ascertain the reasons for the rejection, to inform the contracting officer that the Dumont part number (the hand-written notation on its pricing page) had been supplied to and accepted by other Government activities as a comparable item to other probe packages, and to request that in view of the latter the bid sample requirement be waived. At this time the contracting officer was allegedly advised that Dumont would protest any award to any bidder other than itself. A telegram to this effect was sent to the contracting officer on October 13.

The bases of the Dumont protest were that its bid sample had been rejected for trivial technical reasons and that in view of the previous acceptance of its indicated part number by other Government agencies the bid sample requirement should be waived. Subsequently, Dumont protested the award to Tektronix on the bases that this is the third or fourth recent rejection on minute technicalities of Dumont bids by the same contracting activity and that while the contracting activity took approximately 100 days to evaluate the bid sample (instead of the 15 maximum permitted) it only took the activity 8 hours after it was notified by Dumont of its protest to award the contract to Tektronix.

B-190528

First, as regards whether the protest was lodged before or after award and consequently whether or not the award was made in violation of Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3) (1976 ed.), the date of award is considered to be the date on which the formal contract award document is mailed to the successful bidder. Solar Laboratories, Inc., B-179731, February 25, 1974, 74-1 CFD 99. In this case the contract was mailed on October 13, 1977, following routine distribution procedures and after the contracting officer had signed the contract on October 4. The contracting officer advises that during the October 11 conversation the protester only commented "that he was considering protesting the instant case plus three similar solicitations \* \* \*." If such were the case, the protest telegram, which the contracting activity did not receive until October 14, was filed after the date of award, and consequently the award was properly made. Dumont states, however, that during the conversation on October 11 it informed the contracting officer that it would protest any award made to a party other than itself. However, we do not need to settle the issue for the reasons that follow and because, even if the protest is considered as one filed before award, the failure of the contracting officer to treat it as such and to handle it in accordance with the procedures set forth in ASPR § 2-407.8(b)(3) is only a procedural deficiency which does not affect the validity of an awarded contract. Solar Laboratories, Inc., supra.

As regards the issue of whether the sample requirement should have been waived, two conditions had to be met: (1) the bidder was required to indicate in its bid that it was offering a product which it had also offered to the purchasing office on a previous procurement and (2) the contracting officer had to determine that the product was previously purchased or successfully tested against the specification of the instant procurement by the purchasing office. Aside from whether Dumont appropriately initiated the waiver of the sample requirement in its bid, any item for which waiver was requested had to have been previously supplied to or tested by the purchasing office (the San Antonio Air Logistics Office). The purchasing office had never previously purchased or tested the Dumont item; rather other Government agencies had done so. Thus, Dumont was not eligible for a waiver of the sample requirement, and it was properly denied.

B-190528

Concerning the finding of the Dumont sample to be insufficient and the consequent rejection of the Dumont bid, bidders were advised in the invitation that the bid sample had to be submitted by bid opening in order to be considered. Thus, it would have been improper for the contracting activity, as Dumont suggests it should have, to have advised Dumont after bid opening of the shortcomings in its sample so that Dumont could have corrected them. Further, bidders were advised of the criteria for bid sample evaluation, of the accessory parts that would be required to be supplied, and of the need to submit the manufacturer's Acceptance Test Procedures so that testing of the sample might be made in accordance with them.

Failure to submit these accessory items prevented the activity from testing the items for their compatibility with the probe, workmanship, operational peculiarities, and safety. Failure to submit the Acceptance Test Procedures prevented a sufficient testing of the sample by the activity. In view of these facts and the unsupported contention of Dumont that the nonsubmission of these items was minor, the Dumont bid was properly found to be nonresponsive. Venco Corporation, B-187318, February 15, 1977, 77-1 CPD 113.

As regards the Dumont allegation that the reason that the above-mentioned items were not with the sample was because they were probably lost through negligent handling of the sample by the contracting activity, the record does not permit any conclusion that negligent handling that would have caused the loss of these items occurred. Consequently, we cannot find the award or the finding of the Dumont bid to be nonresponsive invalid on the basis of this mere allegation. Lutz Superdyne, Inc., B-188458, July 29, 1977, 77-2 CPD 61.

Concerning the Dumont statement that it is rather curious that while the invitation called for sample evaluation within 15 days it actually took approximately 100 days and then only hours to make the award, we note that Dumont was not, and does not allege that it was, prejudiced by the delay in sample evaluation. Further, contrary to Dumont's allegation, there does not appear to have been any undue rush to award, the handling in that regard having been routine and the elapsed time from the date of the contracting officer's signature to actual mailing which constituted award having been 9 days.

B-190528

In any event, since the bid was properly rejected, the amount of time the purchasing office used to make the award is not relevant.

As to the fact that Dumont believes this procurement is indicative of improper treatment on past procurements by the contracting activity, Dumont does not introduce specific facts on this allegation (other than as regards one other procurement), and, in any event, since the Dumont bid on the instant procurement was properly rejected, the alleged past actions could not affect the validity of the instant protested award.

Accordingly, we deny the protest.

*R. F. K. 114*

Deputy Comptroller General  
of the United States